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## BOOK REVIEWS.

THE INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS, INCLUDING THE SHERMAN ACT. WILLIAM L. SNYDER, New York : BAKER, VOORHIS & COMPANY, 1904. pp. XXIII. AND 380.

This work, combining an analysis of numerous decisions of the Supreme Court relating to interstate commerce, with newspaper views expressed by members of the legal profession on certain of the decisions (p. 282), and statements by the alleged head of the beef trust (p. 313), is obviously intended to be of a quasi-legal nature, and to serve more as a convenient digest of statutes and decisions than as a carefully reasoned out statement of the principles of law applicable to the subject treated. No attempt seems to be made to distinguish apparently conflicting decisions, nor can it be said that the arrangement of the cases is of the most satisfactory description. In fact it is often difficult to discover the basis of the arrangement. Judged, however, in the light of a convenient digest, the work has many good features. The author's style is clear and not involved. His quotations from cases (at times very lengthy) are apparently well chosen and his own statements of facts are as a rule well made. Occasionally, though, there is too great an inclination to indulge in the language of a stump orator in preference to the impartial language usually used by legal authors. In this connection, too, we think that the members of the Kansas City Live Stock Exchange will be greatly surprised (p. 265) to learn that they are "a constituent of the beef trust." As a matter of fact they have probably suffered as a whole as much as any class in the community from the combination supposed to exist among the packers.

It is to be hoped that the author will use the present work as a basis for a more scientific presentation of the subject later on, and that he will give us a permanently useful work on the important subjects treated by him.

A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW. By John Henry Wigmore. Boston: Little, Brown & Company, 1904. Vol. III, pp. xix, 1975-3184.

In the review of Volume I an error occurred which may be corrected here. In arguing (COLUMBIA LAW REVIEW, Vol. V, p. 70.) that *Wright v. Tatham* (9 Cl. & F. 670) does not necessarily determine that conduct is open to the objection of being hearsay, it was suggested *inter alia* that the conduct there offered was to be used to indicate the opinions of non-expert witnesses concerning sanity and that it should therefore have been preceded by statements by those non-experts of the bases of their opinions. Such an argument would no doubt be sound in most American jurisdictions, but the law of Eng-

land does not warrant it (§ 1922). It therefore has no bearing on *Wright v. Tatham*.

To enumerate the conspicuously good discussions in Volume III would require considerable space and probably hardly repay the reader of this review, who after all must read the discussions themselves to appreciate them. Two or three matters, however, the treatment of which besides being excellent is novel, at least in its fulness and thoroughness, should be noticed. The admissibility of official statements as an exception to the hearsay rule is completely set forth (§§ 1630-1684). The numerous varieties of such documents are each independently treated. The statutes of the different jurisdictions affecting each class are given. For a good example see § 1680. Taylor (*Evidence*, Vol. III, Chap. IV.) did a similar though less satisfactory piece of work for England; but concerning American law nothing really approaching Mr. WIGMORE's presentation has heretofore appeared. Another discussion of great value is that concerning the discovery of evidence before trial (§§ 1845-1862). Here again the statutory modifications are incorporated in such a way as to give the reader a clear view of the common law doctrine and the present state of the law. Again, the question, whether a party offering a conversation or a writing must offer it entire or may introduce merely the part that serves his purpose, and whether if the proponent may offer part the opponent may introduce the remainder, are dealt with in a most enlightening manner (§§ 2094-2125). The practitioner will find here real aid. Indeed, this third volume from cover to cover is a splendid piece of work. It sets a high-water mark for legal writing on a large scale that will not be passed soon.

The most interesting because the most confused part of the hearsay rule is that group of subjects which courts usually refuse to differentiate but rather throw together under the meaningless catch-all "*res gestæ*." Professor THAYER was the first to let light into this vale of darkness. But Professor WIGMORE has removed some clouds which THAYER had left. Declarations evidencing a mental condition (§ 1725 et seq.), Spontaneous Exclamations (§ 1745 et seq.), and declarations in issue (§ 1770) are now plainly understood. But even in Mr. WIGMORE's excellent treatment of these matters there seems some vagueness concerning declarations used circumstantially (§ 1788 et seq.) and concerning the true limits in one direction of the Mental Condition Exception. This becomes evident most clearly in the following sort of case. The contents of a lost will are in issue. This post-testamentary declaration of the testator is offered: "My wife will not need anything after my death." The aim is to strengthen other evidence of a provision for the wife in the will. This kind of question is dealt with in § 1736. The position of the author seems fairly stated in saying that he considers such a statement as outside the ban of hearsay and that if it were hearsay it would be admissible under the Mental Condition Exception. At all events he states that position as the "Third Theory" without disapproval. To the writer it seems unsound. The argument for holding that it is not hearsay is based on the distinction between a circumstantial use of extra judicial language and a testimonial use. Mr. WIGMORE considers that language is used circumstantially when it "can be used . . . without inferring

from it as an assertion to the fact asserted" (§ 1788) or "If . . . offered . . . without reference to the truth of the matter asserted" (§ 1768). Clearly the statement of the testator "*can* be used" without inferring from it to the fact asserted; namely, that his wife will need nothing. It "*can* be used" to evidence his *belief* that he has provided for her in his will. Clearly also it may be "offered . . . without reference to the truth of the matter asserted" and merely to show the testator's *belief* in the provision. Therefore, according to the tests suggested, it is not hearsay. But suppose the testator says: "I have left my wife the home place and \$5,000 a year." That is surely hearsay of the contents. Yet it also "*can* be used" to evidence not the fact asserted but the testator's belief in that fact. It also may be "offered" to prove this belief. The belief if established is of course admissible evidence of the fact (§ 172 et seq.). And so likewise every hearsay statement may be made to escape that category by offering it to prove not the fact it states but the declarant's belief in that fact. This obviously will not do. Professor THAYER (15 Am. Law Rev. 78) gives us a more accurate test. The rule against hearsay "excludes all statements that *may* have support from the credit" of the declarant. "Some statements are not included in the rule simply because they cannot . . . , having regard to the purpose for which they are received,—derive strength from the credit of the declarant." How a statement "*can* be used" or the theory on which it is "offered" is therefore immaterial. *May* the jury in using it give credit to the declarant? If yes, it is hearsay. If they *cannot*, it is used circumstantially. Suppose the declarant to be wilfully prevaricating. Is the statement still as useful? If not, it is hearsay. By such a standard the testator's statement that his wife will need nothing is clearly hearsay.

But granting it hearsay, is it not admissible as evidencing belief and so as within the Mental Condition exception? The answer must be in the negative. An affirmative answer will again overturn the entire rule against hearsay. Every statement of fact evidences a belief in the existence in the fact and that belief in turn evidences the fact itself. Thus all extra judicial statements of fact would be admissible. The Mental Condition exception must have this limit: if the statement is offered to evidence a mental condition and that mental condition in turn is to be used to evidence any past or present fact other than another mental condition, the statement is not admissible under this exception. Thus a statement by a testator that he has revoked his will is admissible to prove his belief in its revocation and through it his past *intent* (another mental condition) to revoke (§ 1737); but it is not admissible under our present exception to evidence the belief in its revocation and thus the past *act* of revocation. If post-testamentary statements of a testator are admissible to prove the contents, the act of execution, or the act of revocation of a will, it must be under the second theory (§ 1736) of a special hearsay exception for such cases. That this is so is recognized by a majority of courts (§ 1736).

If space permitted, it would be worth while to consider carefully the propriety of a "Verbal Act" doctrine (§ 1772 et seq.). To the writer this seems a remnant of the *res gestæ* confusion. It must suffice to say that all the instances adduced by Professor WIGMORE seem to

be capable of classification either; (a) as conduct and statements together constituting (not evidencing) a fact in issue and so of course admissible, as for example in the case of adverse possession (§ 1778), (b) as conduct and statements together used evidentially but for a purpose which makes the credit of the declarant immaterial and thus as circumstantial evidence, as for example § 1779, (c) as declarations of a mental condition (usually intent) as for example declarations by a bankrupt as to his intent on leaving home (§ 1783) or declarations as to intent concerning domicile (§ 1784). The first class above is simply a variety of declarations in issue (§ 1770): the second class is a variety of declarations used circumstantially (§ 1788 et seq.): the third class merely includes examples of the Mental Condition exception to the Hearsay rule (§ 1725 et seq.). To throw them together as if depending on some common principle is likely to lead to confusion and misunderstanding. If merit counts, Wigmore on Evidence is destined to become the great reference work on Evidence. One therefore regrets that any imperfections are present. Indeed, some may consider the above criticisms unsound. However that may be, it must be remembered that the errors, if any, are but few in a work of really gigantic proportions.

THE LAW OF FOREIGN CORPORATIONS. Joseph H. Beale, Jr. Boston: William J. Nagel. 1904. pp. xxvi, 1149.

The title of this work is misleading and does not cover the subjects treated by the author. Dealing as it does with the organization of corporations and those points usually connected therewith, which often influence the choice of the State in which a given corporation is to be organized, it might more properly be known as "Beale on the Formation, Control and Taxation of Corporations." There has evidently been a demand for a work of this character, for the present book is but one of several similar treatises which have appeared lately. As a handy reference work to determine the proper State within which to organize and to get general ideas upon the subjects treated, the present work is of value. However, like all similar works, it is open to the grave objection that selections only from the laws of the several States are given, and the lawyer using it must always be subject to the fear that there may be some obscure modifying statute in existence not referred to. Again, dealing as it does with statutory enactments concerning a subject which is being changed more continuously than any other, the work is almost out of date before it is printed and very rapidly loses the value it has. For example, the present work published in 1904 does not contain several important amendments to the New York law concerning foreign corporations passed in 1904, and an officer of a foreign trust company (for example) desiring to do business in New York would obtain no idea of the difficulties in his way from a perusal of this work.

Subject to this objection, the work has many good features. The author's statutory references seem very accurate, and there are many chapters in the work of permanent value. The chapters dealing with questions of taxation will prove to be of high practical importance,